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AUTHORITIES CITED

CASES:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1028

UNITED STATES OF AMERICA,

Petitioner,

vs.

DIMAS CAMPOS-SERRANO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATE OF ILLINOIS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Responsible prosecutors in every state are vitally concerned with the scope and meaning of the concept of custody in determining the applicability of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) to specific cases. More particularly, prosecutors are concerned with the relevance of "focus" and its effect on the determination of custody.

Finally, the State of Illinois has a specific interest in this case since the admission into evidence at state trials of defendants' confessions and admissions is subject, ultimately, to review by the Court of Appeals for the Seventh Circuit.

Accordingly, the State of Illinois, with the sponsorship of its Attorney General, offers this brief in support of the petitioner's argument that the court below unduly extended *Miranda* v. *Arizona*, 384 U.S. 436 (1966).[1]

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1. The State of Illinois has no specific interest in the resolution of the second issue presented herein, i.e. the status of alien registration cards as "required records".

ARGUMENT

THE STATE OF MIND OF A LAW ENFORCEMENT OFFICER WHILE QUESTIONING A SUSPECT IS LARGELY IRRELEVANT TO THE DETERMINATION OF WHETHER MIRANDA WARNINGS ARE REQUIRED AND THE COURT BELOW ERRED IN HOLDING THAT MIRANDA WARNINGS WERE REQUIRED BECAUSE THE QUESTIONS OF I.N.S. AGENTS WERE DIRECTED AT DETERMINING A CRIMINAL INVESTIGATION.

In *United States* v. *Dickerson,* 413 F. 2d 1111 (7th Cir. 1969) the court below relied heavily on the state of mind of revenue agents in determining whether they must give *Miranda* warnings to taxpayers whom they question. In particular, the Court of Appeals said that warnings are required at "the first contact with the taxpayer after the case has been transferred to the Intelligence Division". (413 F. 2d at 1117.) In simpler terms, the court held that as soon as the agent knows the case is criminal in nature and intends to elicit information that incriminates, *Miranda* warnings must be given. Presumably, this result would follow even if the suspect were to be questioned in his own home during daylight hours in the presence of friends and family by a single, unarmed and courteous agent. Surely, this concept of custody cannot reasonably be applied to such a situation.[2]

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2. The Dickerson rule is based, in part, on the special problems arising with agencies whose investigative powers are primarily exercised in civil matters but may also be used to secure evidence for criminal prosecutions. Even so, the Dickerson rule represents a distinct minority viewpoint. See: Spinney v. United States, 385 F. 2d 908 (1st

In the present case, the court used a similar sort of rationale. The court relied heavily on the fact that "the inquiry itself [was] directed at determining a criminal violation such as in this case where the agents are looking for forged 'cards'" *United States* v. *Campos-Serrano*, 430 F. 2d 173, 176 (7th Cir. 1970).[3]

Cir. 1967) cert. denied, 390 U.S. 921 (1968); United States v. White, 417 F. 2d 89 (2d Cir. 1969), cert. denied, 397 U.S. 912 (1970); United States v. Bagdasian, 398 F. 2d 971 (4th Cir. 1968); United States v. Marius, 378 F. 2d 716 (6th Cir. 1967), cert. denied, 389 U.S. 905 (1967); Cohen v. United States, 405 F. 2d 34 (8th Cir. 1968) cert. denied, 394 U.S. 943 (1969); United States v. Chikata, 427 F. 2d 385 (9th Cir. 1970); Hensley v. United States, 406 F. 2d 481 (10th Cir. 1969). See also Dosek v. United States, 405 F. 2d 405 (8th Cir. 1968) (S.E.C. Investigator); Ouletta v. State, 442 S.W. 2d 216 (Ark. 1969) (Federal bank examiner need not give warnings when he suspected the defendant of forgery and invited him to an interview at the bank) approved in Ouletta v. Sarver, 307 F. Supp. 1099 (E.D. Ark. 1970). The Seventh Circuit's Dickerson rule has been specifically rejected in United States v. Caiello, 420 F. 2d 471 (2d Cir. 1969); United States v. Jaskiewicz, 433 F. 2d 415 (3rd Cir. 1970); United States v. Browney, 421 F. 2d 48 (4th Cir. 1970); United States v. Prudden, 424 F. 2d 1021 (5th Cir. 1970); United States v. Simon, 421 F. 2d 667 (9th Cir. 1970). Compare United States v. Prudden, 424 F. 2d 349 (5th Cir. 1970) with United States v. Heffner, 420 F. 2d 809 (4th Cir. 1969) and United States v. Leahey, 434 F. 2d 7 (1st Cir. 1970) regarding the enforcement of administrative regulations requiring warnings by means of the exclusionary rule.

3. This factor was not the only one considered by the court but the remaining facts of the case do not, it seems to us, support any arguable contention that the defendant was in "custody" for purposes of Miranda. In this case, agents of the Immigration and Naturalization Service arrested Manuel Rico in Chicago on November 19, 1968 during

What the court below does is to import into *Miranda* issues the concept of "focus" used in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964). The court below has done this virtually unconscious of the substantial dispute concerning the continuing viability of the "focus" concept.

It seems to us that this Court eliminated the concept of focus when it decided *Miranda.* See *Miranda* v. *Arizona,* 384 U.S. at 44, n. 4. The existence of "focus" was really unnecessary to the result in *Escobedo* since the petitioner there was clearly in custody of police at their station. In all four of the cases giving rise to the *Miranda* rule the suspect was in undisputed custody.[4] The

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an investigation of aliens improperly in this country. The agents accompanied Rico to his apartment to collect his personal belongings. At the apartment, the respondent herein, Campos-Serrano, opened the door. The agents told respondent that Rico was under arrest but could gather his belongings. One of the agents then asked Campos-Serrano where he was from. Respondent answered that he was from Mexico and the agent then demanded some identification. Respondent produced an alien registration receipt card and a social security card. The agents examined the alien registration card, returned it to Campos-Serrano, and left. Outside the apartment, the agents arrested a second man whose alien registration card had been altered. They returned to the same apartment where the three men lived to allow the third man to collect his belongings. Inside the apartment, the agents asked to see Campos-Serrano's alien registration card a second time. Upon examination of the card, the agents determined it had been altered and arrested respondent.

4. Miranda v. Arizona (No. 759) (In Phoenix police station after arrest) Vignera v. New York (No. 760) (In detective squad headquarters after being picked up) Westover v. United States (No. 761) (In Kansas City police station after arrest) California v. Stewart (No. 584) (In a cell at a police station after arrest).

Court characterized the common features of the cases in these words: "In each, the defendant was questioned . . . in a room in which he was cut off from the outside world. . . . They all thus share salient features—incommunicado interrogation of individuals in a police dominated atmosphere. . . ." 384 U.S. at 445. The Court applied its holding to "custodial" interrogation or "an interrogation occurring after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444.

There is no language in these cases about "focus" though in all of the cases there was "focus". Nor is there language concerning the intent of the interrogators. The Court simply abandoned the confusing and subjective concept of focus for the clearer and more meaningful concept of custody. In short, the Court made a fresh start in interrogation cases, creating a new clear set of rights and a new clear criterion for judging their applicability.[5]

In the leading case of *Lowe* v. *United States,* 407 F. 2d 1391 (9th Cir. 1969) it was held that the "Court's decision in *Miranda* clearly abandoned 'focus of investigation' as a test to determine when rights attach in confession cases." In essence, the *Lowe* Court held that it does not matter what the officer knew about the defendant's guilt or what the officer intended to do with defendant so long as the officer did nothing to make the defendant believe he was in custody.

In line with this reasoning the majority of courts have generally held that (1) the fact an officer knows the sus-

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5. See Kamisar, "Custodial Interrogation Within the Meaning of Miranda," Criminal Law and The Constitution—Sources and Commentaries, 335, 338-51, 362 (1968).

pect committed the crime or (2) intends to arrest the suspect at the end of the interview or (3) would not allow the suspect to leave if he tried, does not require that *Miranda* warnings be given if the interview is not otherwise custodial. *United States* v. *Hall*, 421 F. 2d 540 (2nd Cir. 1969); *United States* v. *Charpentier*, —— F. 2d —— (10th Cir. 1971); *State* v. *Hall*, 468 P. 2d 598 (Ariz. App. 1970); *People* v. *Arnold*, 426 P. 2d 515 (Cal. 1967); *People* v. *Hazel*, 60 Cal. Rptr. 437 (Cal. App. 1967); *People* v. *Butterfield*, 65 Cal. Rptr. 765 (Cal. App. 1968; *People* v. *Giovianini*, 67 Cal. Rptr. 303 (Cal. App. 1968); *People* v. *King*, 78 Cal. Rptr. 146 (Cal. App. 1969); *People* v. *Fischetti*, 264 N.E. 2d 191 (Ill. 1970); *People* v. *Rodney P.*, 233 N.E. 2d 255 (N.Y. 1967); *State v. Sandoval*, 452 P. 2d 360 (Idaho 1969); *Myers* v. *State*, 240 A. 2d 288 (Md. App. 1968). In essence, the courts have regarded the intent or knowledge of the officer as irrelevant so long as it is unvoiced, i.e., not stated to the suspect. *Allen* v. *United States*, 390 F. 2d 476 (D.C. Cir. 1968); *William* v. *United States*, 381 F. 2d 20 (9th Cir. 1968); *United States* v. *Davis*, 259 F. Supp. 496 (Mass. 1966) (defendant unaware of arrest warrant in possession of interrogator); *State* v. *Sherron*, 463 P. 2d 533 (Ariz. 1970); *State* v. *Taylor*, 437 P. 2d 853 (Ore. 1968).

The basic theory underlying this view has been stated many times. For example, in *United States* v. *Squeri*, 398 F. 2d 785, 790 (2nd Cir. 1968), the court said:

> "The Fifth Amendment privilege prohibits the government from compelling a person to incriminate himself. It was the compulsive aspect of custodial interrogation and not the strength or content of the government's suspicion at the time the questioning was conducted, which led the court to impose the "Miranda" requirements with regard to custodial questioning.

> We believe that the presence or absence of compelling pressures, rather than the state to which the government's investigation has developed, determines whether the Miranda requirements apply to any particular case."

And in *United States* v. *Jaskiewich*, 433 F. 2d 415, 419 (3rd Cir. 1970) the court weighed the issue of whether

> "The affirmative duties imposed by Miranda arise by virtue of the defendant's being a potential target of an indictment, or arise by virtue of the fact that a government agency has in some meaningful way subjected him to physical, or perhaps psychological, restraint. We are persuaded that those duties arise not because the defendant has become the focus of a potential indictment but because the government has in some meaningful way imposed restraint on his freedom of action."

The most striking example of this interpretation of *Miranda* is *People* v. *Allen*, 281 N.Y.S. 2d 602 (N.Y. App. 1967). There an officer with probable cause to arrest and an intention to arrest went to the suspect's home and questioned him in the presence of his family without telling him he was under arrest. After the conversation the suspect was arrested. The court held that warnings were not required. A footnote in *Miranda*, detailing, with apparent approval, the Scot's practice of interrogating suspects in their homes (384 U.S. at 478 n. 46) led the court to believe this procedure does not require the giving of warnings.

The courts which adhere generally to the view that the focus concept is to be discarded have formulated an "objective" test of custody, i.e., whether under the circumstances of the case, a reasonable man would believe himself to be in custody. The key phrase is a "reason-

able" belief on the part of the "reasonable" suspect. The mere subjective assertion of a suspect that he considered himself under arrest is not enough. *Freije* v. *United States*, 408 F. 2d 100 (1st Cir. 1969); *Lowe* v. *United States*, 407 F. 2d 1391 (9th Cir. 1969); *People* v. *Morse*, 452 P. 2d 607 (Cal. 1969). Cf. *United States* v. *Cortez*, 425 F. 2d 452 (6th Cir. 1970). Extraordinary frailties and sensitivities of the individual are not relevant. *People* v. *Rodney P.*, 233 N.E. 2d 255 (N.Y. 1967). As was said in the recent case of *People* v. *Yukl*, 256 N.E. 2d 172, 174 (N.Y. 1969) the issue is "Not what the defendant thought but rather what a reasonable man, innocent of any crime, would have thought had he been in the defendant's position."

Under the objective test the court in *People* v. *Arnold*, 426 P. 2d 515 (Cal. 1967) refused to accept the simple assertion of a suspect who said she thought she had no alternative but to appear for questioning. The court asked the trial court to consider:

> "the precise language used by the deputy district attorney in summoning Mrs. Arnold to his office, . . . any statements of the deputy not transcribed, made before or after formal interrogation and . . . the physical surroundings . . . the extent to which the authorities confronted defendant with evidence of her guilt, the pressures exerted to detain defendant and any other circumstances which might have led defendant reasonably to believe that she could not leave freely." (426 P. 2d at 522)

At the other end of the spectrum are those courts which use focus as a definitive test. These courts reason that custody arises at the latest when the officer has probable cause to arrest. See *People* v. *Wright*, 78 Cal. Rptr. 75 (Cal. App. 1969); *People* v. *Bright*, 84 Cal.

Rptr. 691 (Cal. App. 1969). See also *Windsor* v. *United States*, 389 F. 2d 539 (5th Cir. 1968); *State* v. *Anderson*, 428 P. 2d 672 (Ariz. 1967); *State* v. *Thomas*, 454 P. 2d 153 (Ariz. 1969); *People* v. *Orf*, 472 P. 2d 123 (Colo. 1970); *State* v. *Kinn*, 178 N.W. 2d 888 (Minn. 1970); *State* v. *Thomas*, 266 A. 2d 614 (N.J. Super 1970); *Commonwealth* v. *Sites*, 235 A. 2d 387 (Pa. 1967); *Commonwealth* v. *Feldman*, 248 A. 2d 1 (Pa. 1968); *Johnson* v. *Commonwealth*, 160 S.E. 2d 793 (Va. 1968); *Dean* v. *Commonwealth*, 166 S.E. 2d 229 (Va. 1969).

The questionable results flowing from the use of a strict focus test to determine the time when "custody" exists are shown in *Windsor* v. *United States*, 389 F. 2d 530 (5th Cir. 1968) and *Commonwealth* v. *Jefferson*, 423 Pa. Super. 541, 226 A. 2d 765 (1966). In *Windsor*, two F. B. I. agents questioned defendant in his hotel room. The defendant was told that he was not under arrest, was not being detained in any way and did not have to answer any questions. The court found his inculpatory oral statement inadmissible because the agents had probable cause to arrest defendant prior to the questioning.

In *Jefferson*, the defendant was eventually convicted of murder growing out of a stabbing which took place on public streets. A police officer on patrol proceeded to a nearby hospital to investigate. Upon entering the accident ward he found several persons including the defendant. In answer to his general inquiries defendant made an inculpatory statement. Another police officer arrived several minutes later and was briefed by the first officer. The second officer asked the group of people, "who did the stabbing?" Defendant said "I did." No warnings were given to defendant prior to either of the statements. The court held that custody "attached" after the ques-

tioning of the first officer but before the questioning of the second officer. The explanation given was that the second officer, due to being briefed by the first officer, had probable cause to arrest the defendant. In commenting on this decision, the New York Court of Appeals stated, "The reasoning overlooks the language and purpose of the Miranda warnings which is to protect the individual's freedom of choice—to answer or not answer—in situations which are inherently coercive. In so doing the Pennsylvania Court reached the rather anomalous result of rejecting an admission made under the same circumstances and conditions as the admissions it accepted merely because as a result of the first questioning, the police would not have permitted her to leave, had she attempted to do so." *People* v. *Rodney P.*, 236 N.E. 2d 255, 259 (N.Y. 1967).

The courts that rely solely or heavily on focus seem to make two serious errors. The first is ignoring the clear implication in *Hoffa* v. *United States*, 385 U.S. 293 (1966) that whether the police have probable cause to arrest has no relevance to when the right of a suspect to receive warnings attaches. In *Hoffa*, an informer in Hoffa's group recorded several conversations in which the informer participated and which constituted evidence of jury tampering. In answer to the contention that when the informer and the Government had probable cause to arrest Hoffa, they should have done so instead of continuing to participate in additional conversations, the Court said;

> "Law enforcement officers are under no Constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence may fall short of the amount necessary to support a criminal conviction." 385 U.S. at 309-10.

The second error is that the "focus" courts have not only failed to read *Hoffa* and *Miranda* carefully—they have failed to read *Escobedo* carefully. The test in *Escobedo* was not merely "focus", it was "focus" *and* custody *and* interrogation. The Court in *Escobedo* defined the situation in which its holding became operative in this language:

> "Where . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, (and) the police carry out a process of interrogations that lends itself to eliciting incriminating statements." (*Escobedo* v. *Illinois*, 378 U.S. 478, 490-91).

Several courts consider focus not as a determinative factor but as a significant one. The degree of significance attached to focus varies from case to case. See *Agius* v. *United States*, 413 F. 2d 915 (5th Cir. 1969) (existence of focus requires close scrutiny); *Archer* v. *United States*, 393 F. 2d 124 (5th Cir. 1968); *McMillan* v. *United States*, 399 F. 2d 478 (5th Cir. 1968); *United States* v. *Montas*, 421 F. 2d 215 (5th Cir. 1970); *United States* v. *De LaCruz*, 420 F. 2d 1093 (7th Cir. 1970); *United States* v. *Cortez*, 425 F. 2d 453 (6th Cir. 1970); *State* v. *Tellez*, 431 P. 2d 691 (Ariz. App. 1967); *People* v. *Merchant*, 67 Cal. Rptr. 459 (Cal. App. 1968); *State* v. *District Court*, 432 P. 2d 93 (Mont. 1967).

The Second Circuit Court of Appeals took this position in a case where three agents interviewed a suspect in his home. *United States* v. *Hall*, 421 F. 2d 540 (2nd Cir. 1969). The court first held that the fact the agents would have stopped the suspect if he fled was immaterial. The court then referred to the footnote in *Miranda* concerning interrogation at the home:

> "We do think it (the footnote at 384 U.S. 478 n. 46) suggests that in absence of actual arrest something must be said or done by the authorities either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so. This is not to say that the amount of information possessed by the police and the consequent acuity of their 'focus' is irrelevant. The more cause for believing the suspect committed the crime, the greater the tendency to bear down in interrogation and to create the kind of atmosphere of significant restraint that triggers *Miranda*." (421 F. 2d at 545).

The court in *Hall* seems to view "focus" as having a dual role. First, it is a factor for aiding judgment as to the relative credibility of questioner and suspect as they each contend for a finding favorable to their position. Second, if the law enforcement officers have 'focused' on a particular suspect, the court should pay close attention to the possibility that this subjective focusing might lead to the placement of objective pressures on the defendant. "The more cause for believing the suspect committed the crime, the greater the tendency to bear down in interrogation and to create the kind of atmosphere of significant restraint that triggers *Miranda*, and vice versa." *United States* v. *Hall, supra* at 545. This limited view of the role "focus" plays in determining whether custody exists has some validity.

However, experience has shown that it is the lack of focus that is most often the operative fact in reported decisions. Several courts have reasoned, in effect, that since the police had no reason to take anyone into custody—the person interviewed was not, in fact, in custody. See *United States* v. *Gibson*, 392 F. 2d 373 (4th Cir. 1968); *Menendez* v. *United States*, 393 F. 2d 312 (5th Cir. 1968);

United States v. *Welsh*, 417 F. 2d 361 (5th Cir. 1969); *United States* v. *Delamarra*, 275 F. Supp. 1 (D.C. Cir. 1967); *United States* v. *Tchack*, 296 F. Supp. 500 (S.D. N.Y. 1969); *State* v. *Hunt*, 447 P. 2d 896 (Ariz. App. 1968); *People* v. *Hill*, 452 P. 2d 329 (Cal. 1969); *People* v. *Beasley*, 58 Cal. Rptr. 485 (Cal. App. 1967); *People* v. *Kasperek*, 77 Cal. Rptr. 904 (Cal. App. 1969); *State* v. *Church*, 169 N.W. 2d 889 (Iowa, 1969); *Jackson* v. *State*, 259 A. 2d 587 (Md. App. 1969); *State* v. *Bradford*, 434 S.W. 2d 497 (Mo. 1968); *State* v. *Webb*, 469 P. 2d 153 (Cal. App. 1970); *People* v. *Oramus*, 250 N.E. 2d 723 (N.Y. 1969) (by implication); *People* v. *Brosnan*, 299 N.Y.S. 2d 263 (N.Y. App. 1969); *Commonwealth* v. *Frye*, 252 A. 2d 580 (Pa. 1969); *State* v. *Jimenez*, 451 P. 2d 583 (Utah, 1969); *Roney* v. *State*, 171 N.W. 2d 400 (Wis. 1969). See especially *People* v. *Barnes*, 252 A. 2d 398 (N.J. 1969); *Coward* v. *State*, 268 A. 2d 508 (Md. App. 1970); *State* v. *Farmer*, 476 P. 2d 129 (Wash. App. 1970); *United States* v. *Fish*, 432 F. 2d 107 (4th Cir. 1970).

It is the position of the *amicus curiae* that focus is significant only when it is absent. The lack of focus can serve to assure a court that a particular interrogation is general investigative questioning and thus outside the scope of *Miranda*. However, in nearly every case, the custody question can be decided after a careful examination of the objective circumstances of such interrogation without considering the subjective mental state of the questioner or the suspect. The resolution of custody questions almost exclusively upon objective circumstances, i.e., where and when interrogation took place, who was present and what was said and done, is the best, most accurate and fairest approach. In our view, the best rule for determining custody is whether a reasonable man, inno-

cent of any crime, would reasonably believe he was in custody were he in the defendant's position.[6] The application of this rule does not require inquiry into the private thoughts of the questioner, as long as these thoughts remain private and are not communicated to the suspect. In its reliance upon the I.N.S. agent's "direction" in asking for the alien registration card, the court below departed from the better rule. Its decision ought to be reversed and this Court should make clear what

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6. This rule allows for what may be termed a deliberate non-custodial interrogation. This is a clearly non-custodial interview conducted with an individual who is known or suspected of having committed a crime. The purpose of the interview is to secure damaging evidence. As long as the objective circumstances of such an interview are manifestly non-custodial the requirements of Miranda should not apply.

In this connection it is worthwhile to consider the words of Chief Justice Weintraub of New Jersey dealing with a Miranda problem:

> "There is no right to escape detection. There is no right to commit a perfect crime or to an equal opportunity to that end. The Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will. Nor is it dirty business to use evidence a defendant himself may furnish in the detectional stage. . . . As to the culprit who reveals his guilt unwittingly with no intent to shed his inner burden, it is no more unfair to use the evidence he thereby reveals than it is to turn against him clues at the scene of the crime which a brighter, better informed or more gifted criminal would not have left. . . . It is consonant with good morals and the Constitution to exploit a criminal's ignorance or stupidity in the detectional process." State v. McKnight, 52 N.J. 35, 52-53, 243 A. 2d 240 (1968).

was implicit in *Miranda,* that the existence of focus is not the proper test for determining when *Miranda* is to be applied.

CONCLUSION

For the foregoing reasons, the State of Illinois as *amicus curiae* requests that the decision of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General,
State of Illinois,

JOEL M. FLAUM,
First Assistant Attorney General,

JAMES B. ZAGEL,
Assistant Attorney General,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601 (312-793-2570),

Attorneys for the State of Illinois as Amicus Curiae.

JAYNE A. CARR,
Assistant Attorney General,
Of Counsel.

Ronald Lev, a senior student at Northwestern University School of Law, Chicago, Illinois, assisted in the research and preparation of the instant Brief.

APPENDIX

AN ANALYSIS OF REPORTED DECISIONS ON THE ISSUE OF "CUSTODY" UNDER MIRANDA V. ARIZONA*

*This analysis is a slightly revised version of one portion of "Confessions and Interrogations After Miranda", a monograph published by the National District Attorneys Association. The original monograph dealt with all of the issues arising under Miranda and is exhaustive with respect to all decisions reported prior to August 1, 1970. The portion reprinted here appeared under the heading "Issues in Miranda: Is it Custodial?" The author of the monograph, who has signed this brief as well, has revised the materials to include decisions reported prior to March 1, 1971. Citations do not include denials of certiorari.

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The Effect of Particular Circumstances Upon The Determination of "Custody"

I THE PLACE OF INTERROGATION

The experience of the Courts subsequent to Miranda has shown that the place of interrogation is a vital factor in determining custody. It is not, however, a conclusive factor.

In the sections that follow the analysis is based largely on the location of the interrogation. It must not be forgotten, however, that the actual physical circumstances and familiarity of the room where the interrogation takes place is also significant. See United States v. Hall, 421 F. 2d 540 (2nd Cir. 1969); United States v. Lackey, 413 F. 2d 655 (7th Cir. 1969) (small room); United States v. Gower, 271 F. Supp. 655 (M.D. Pa. 1967); People v. Bryant, 231 N.E. 2d 4 (Ill. App. 1967) (closed room); Gaudio v. State, 230 A. 2d 700 (Md. App. 1967); State v. Seefeldt, 242 A. 2d 322 (N.J. 1968). (law library in prosecutor's office); State v. Douglas, 235 So. 2d 563 (La. 1970); Shedrick v. State, 271 A. 2d 773 (Md. App. 1970) (small room); Underwood v. State, —— S.W. 2d —— (Tenn. App. 1970) (closed room).

A. Police Stations and Police Vehicles—In all four cases decided under Miranda the suspect was questioned in a police station after arrest. Nevertheless, it is clear that interrogation inside what one Court has called "buildings housing law enforcement personnel" (Evans v. United States, 377 F. 2d 535 (5th Cir. 1967) is not necessarily custodial. There have been numerous cases in which the presence of a suspect at a police station was clearly non-custodial.

In Hicks v. United States, 382 F. 2d 158 (D.C. Cir. 1967) it was held that statements given in response to interrogation at police headquarters were not custodial when defendant voluntarily went to headquarters upon request. Accord: United States v. Knight, 261 F. Supp. 843 (E.D. Pa. 1966) (Uniformed Air Force investigator asked defendant to come to his office to answer questions about mail theft for which defendant was suspected.); United States v. Appell, 259 F. Supp. 156 (D. Mass. 1966). (Postal inspector caught defendant in the act and asked him to come to his office.)

Under proper circumstances Courts have accepted the proposition that someone can legitimately be said to have been invited to a police station; United States v. Tobin, 429 F. 2d 1261 (8th Cir. 1970) (told he was free to leave); Thompson v. United States, 382 F. 2d 390 (9th Cir. 1967); United States v. Cortez, 425 F. 2d 453 (6th Cir. 1970); United States v. Bird, 293 F. Supp. 1265 (Mont. 1968); People v. Richards, 256 N.E. 2d 475 (Ill. App. 1970); McFadden v. State, 231 A. 2d 910 (Md. App. 1967); Commonwealth v. Fisher, 238 N.E. 2d 525 (Mass. 1968) (invitation by phone); disapproved in Fisher v. Scafati, 314 F. Supp. 929 (D. Miss. 1970) (reliance on purpose of officers to elicit admissions); Jones v. State, 442 S.W. 2d 698 (Texas 1969); State v. Bower, 440 P. 2d 167 (Wash. 1968); State v. Miller, 151 N.W. 2d 157 (Wis. 1967); See United States v. Freije, 408 F. 2d 100 (1st Cir. 1969) (Officer told defendant he would meet with him wherever defendant preferred); Contra: Commonwealth v. Banks, 239 A. 2d 416 (Pa. 1968); Commonwealth v. Brown, 247 A. 2d 802 (Penn. App. 1968); State v. Dillon, 471 P. 2d 553 (Idaho 1970).

In addition to these kinds of cases the Courts have held police station interrogation to be non-custodial when

the person questioned is present as a witness. Clark v. United States, 400 F. 2d 83 (9th Cir. 1968) (two drivers in an accident, both brought into station for report); State v. Williams, 235 A. 2d 684 (N.J. App. 1967) aff'd. 255 A. 2d 817 (N.J. 1968) (several persons brought in for routine inquiry: statement also volunteered); People v. Yukl, 256 N.E. 2d 172 (N.Y. 1969) (family and friends of deceased); State v. Cole, 448 P. 2d 523 (Ore. 1968) (witness in protective custody); People v. Pugliese, 260 N.E. 2d 499 (N.Y. 1970) (complaining witness).

There are also cases in which the defendant walks into the station essentially on his own initiative. In People v. Hill, 452 P. 2d 329 (Cal. 1969) the defendant called the police station and volunteered some information concerning a crime, he then offered to and did come to the police station and gave a statement; the questioning was held to be non-custodial. See also People v. Petersen, 59 Cal. Rptr. 694 (Cal. App. 1967) (a defendant walked into station to inquire about release of his car); Tolley v. Page, 436 P. 2d 242 (Okla. 1968).

Of course, there are numerous cases holding that under the circumstances the presence of a suspect at the police station must be considered custodial. United States v. Pierce, 397 F. 2d 128 (4th Cir. 1968) (defendant told over phone he would have to come to the station); United States v. Harrison, 265 F. Supp. 660 (S.D.N.Y. 1967); People v. Fioritto, 441 P. 2d 625 (Cal. 1968); People v. White, 446 P. 2d 993 (Cal. 1968) (defendant was invited but was the subject of investigation and of accusatory inquiries); People v. Allison, 57 Cal. Rptr. 635 (Cal. App. 1967) (custody because of focus); People v. Ellingsen, 65 Cal. Rptr. 744 (Cal. App. 1968); People v. Connor, 75 Cal. Rptr. 405 (Cal. App. 1969) (Arrest after defendant

walked in); People v. Bryant, 231 N.E. 2d 4 (Ill. App. 1967) (focus on defendant plus questioning in a closed room); State v. Phinis, 403 P. 2d 251 (Kan. 1967); Mulligan v. State, 271 A. 2d 385 (Md. App. 1970) (defendant questioned in a police car on the way to the police station); Commonwealth v. Bennett, 264 A. 2d 706 (Pa. 1970) (defendant picked up by police car and taken to station for polygraph); Cf. Pemberton v. Peyton, 288 F. Supp. 920 (E.D. Va. 1968) (defendant driven 65 miles for polygraph test, then interrogated without giving test).

Questioning in police vehicles is also common and where the presence of the person interrogated is clearly a result of invitation the questioning has been non-custodial. State v. Caha, 165 N.W. 2d 362 (Neb. 1969); State v. Travis, 441 P. 2d 597 (Ore. 1968). Such questioning has also been frequently characterized as essentially custodial under rather particular fact situations. State v. Saunders, 435 P. 2d 39 (Ariz. 1969); Myers v. State, 240 A. 2d 288 (Md. App. 1968); Duckett v. State, 240 A. 2d 332 (Md. App. 1968).

B. Jails—In Mathis v. United States, 391 U.S. 1 (1968) the Court, by a vote of 5-3, reversed the Fifth Circuit and held that one who was incarcerated in a penitentiary for one offense was in custody for purposes of interrogation conducted by I.R.S. agents with respect to another offense.

The holding in Mathis was reached by many courts prior to the Supreme Court decision and has been rigorously followed. United States v. Redfield, 402 F. 2d 454 (4th Cir. 1968); United States v. Kucinich, 404 F. 2d 262 (6th Cir. 1968); Seagroves v. State, 211 So. 2d 486 (Ala. 1968); People v. McFall, 66 Cal. Rptr. 277 (Cal. App. 1968); People v. Woodberry, 71 Cal. Rptr. 167 (Cal. App.

1968); Young v. State, 234 So. 2d 341 (Fla. 1970); Hunt v. State, 234 A. 2d 785 (Md. App. 1967); People v. Mallory, 240 N.E. 2d 37 (N.Y. 1968); State v. McDaniel, 158 S.E. 2d 874 (N.C. 1968); Commonwealth v. Simala, 252 A. 2d 575 (Pa. 1969).

Indeed the general rule is that if the suspect is in jail he is in custody for purposes of any interrogation. See People v. Varnum, 427 P. 2d 772 (Cal. 1967); People v. Bolinski, 67 Cal. Rptr. 347 (Cal. App. 1968); Commonwealth v. Eperjesi, 224 A. 2d 216 (Pa. 1966); Dean v. Commonwealth, 166 S.E. 2d 288 (Va. 1969).

If there is exception to the general rule, it arises in cases when the Court finds there was no "interrogation" of a prisoner. See People v. Morse, 452 P. 2d 607 (Cal. 1969) and cases collected under Point V.*

C. Prosecution Offices—In Commonwealth v. O'Toole, 223 N.E. 2d 87 (Mass. 1967) aff'd. on habeas corpus sub nom O'Toole v. Scafati, 386 F. 2d 168 (1st Cir. 1968) the defendant was the City Manager of Revere, Massachusetts. He was the principal suspect in a rather large series of misappropriations of city funds. Defendant was aware of this fact. He was asked to come to the Office of the District Attorney. The Assistant District Attorney asked for an explanation of certain records and disbursements. The defendant's explanations were used against him at his trial. The Court held that the failure of the prosecutor to warn O'Toole of his rights was irrelevant. O'Toole was not in custody in the prosecutor's office nor was he brought there under arrest. Under these circumstances the interrogation was held to be non-custodial under Miranda.

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* Point V in the original monograph deals with the nature and application of the concept of "interrogation."

The courts have regarded interrogations in prosecutor's offices with a fair degree of willingness to find them non-custodial, State v. Seefeldt, 242 A. 2d 322 (N.J. 1968); Commonwealth v. Feldman, 248 A. 2d 1 (Pa. 1968). See also United States v. Jackson, 390 F. 2d 317 (2nd Cir. 1968) (Defense counsel present) People v. Arnold, 426 P. 2d 515 (Cal. 1967).

D. Homes—Ordinarily interrogation in a suspect's home is not custodial but this principle is not absolute. In Orozco v. Texas, 394 U.S. 324 (1969) a suspect was questioned at 4 a.m. in his bedroom by four officers, one of whom testified that the suspect was under arrest. The Court held that the suspect was the subject of custodial interrogation even though the questioning was brief and took place in his own bedroom. The key factors apparently were the time of the interrogation (at 4 a.m. and after the officers were told defendant was asleep), the number of officers and the evidence of formal arrest (though this is unclear.)

Most cases of interrogation at a home involve less severe circumstances and generally it is held that questioning a suspect in his own home without arrest is not custodial interrogation. United States v. Agy, 374 F. 2d 94 (6th Cir. 1967); United States v. Hicks, 382 F. 2d 158 (D.C. Cir. 1967). (Police questioned defendant in her apartment.); United States v. Kubik, 266 F. Supp. 501 (S.D. Iowa 1967). (Defendant questioned several times at his own home); United States v. Essex, 275 F. Supp. 393 (E.D. Tenn. 1967). (Defendant questioned in her home—no warrant or charge pending); People v. Allen, 281 N.Y.S. 2d 602 (App. Div. 1967), (Defendant questioned at home in the presence of family by officers who intended to arrest him after the interview was over);

State v. Meunier, 224 A. 2d 922 (Vt. 1966). (Officer came to home of defendant to question him about a possible speeding violation); State v. Noriega, 433 P. 2d 281 (Ariz. App. 1967). (Police went to defendant's home after he was identified as a burglar and interrogated him there with his family present). People v. Roy, 260 N.E. 2d 5 (Ill. App. 1970) (at defendant's home after he agreed to go to the police station—no custody; also volunteered); People v. Rodney, P. 233 N.E. 2d 255 (N.Y. 1967). (Defendant was questioned in his back yard); Schoonmaker v. State, 279 N.Y.S. 2d 481 (Sup. Ct. 1967) (Prime suspect interviewed in her home).

In Commonwealth v. Eperjesi, 224 A. 2d 216 (Pa. 1966) the defendant was suspected of the death of two children who were found in a refrigerator. Two officers came to her home and she volunteered to one of them that she had shut the refrigerator door. The officer then asked her if she knew the children were inside and she said yes. The issue was whether warnings were required before the officers asked any questions. The Court held that such questions were proper investigation. The Court further reasoned that Miranda was meant to protect those swept from familiar surroundings into police custody.

In People v. Miller, 455 P. 2d 377 (Cal. 1969) the questioning of defendant in his front yard was held non-custodial although the officer suspected the defendant to be involved in what turned out to be a homicide.

In Virgin Islands v. Berne, 412 F. 2d 1055 (3rd Cir. 1969) officers questioned a man who they strongly suspected committed rape—he was questioned at his home and surrendered some clothes from the trunk of his car—this was held non-custodial.

Questioning of a person at his friend's or relative's home is also generally ruled non-custodial. See Steigler v. Superior Court, 252 A. 2d 300 (Del. 1969) (Neighbor's home); State v. Phinis, 430 P. 2d 251 (Kan. 1967); Duffy v. State, 221 A. 2d 633 (Md. 1966) (Police came to arrest defendant but before doing so questioned him in his girlfriend's house); People v. Rogers, 165 N.W. 2d 337 (Mich. App. 1968) (Grandmother's house). United States v. Fish, 432 F. 2d 107 (4th Cir. 1970).

There have been a few—very few—cases in which custodial interrogation was held to have occurred in the suspect's home. These cases arose from special circumstances or relied upon the existence of focus. See Windsor v. United States, 389 F. 2d 530 (5th Cir. 1968) (hotel room); Rosario v. Guam, 391 F. 2d 869 (9th Cir. 1968); Jiminez v. State, 208 So. 2d 124 (Fla. App. 1968) (after return from police station); People v. Paulin, 305 N.Y.S. 2d 607 aff'd. 255 N.E. 2d 607 (N.Y. 1970) ("police dominated" atmosphere); State v. Peters, 231 N.E. 2d 91 (Ohio App. 1967) (brought to home by police after arrest); Commonwealth v. Sites, 235 A. 2d 387 (Pa. 1967) (focus plus moving suspect from presence of friends). United States v. Bekoures, 432 F. 2d 8 (9th Cir. 1970) (close and persistent questioning).

The overwhelming number of cases have found questioning at the suspect's home to be non-custodial. In addition to the cases already cited, see: United States v. Hall, 421 F. 2d 540 (2nd Cir. 1969); United States v. Mackiewicz, 401 F. 2d 219 (2nd Cir. 1968); United States v. Bagdasian, 398 F. 2d 971 (4th Cir. 1968); Evans v. United States, 377 F. 2d 535 (5th Cir. 1967); Menendez v. United States, 393 F. 2d 312 (5th Cir. 1968); McMillan v. United States, 399 F. 2d 478 (5th Cir. 1968); Thomp-

son v. United States, 382 F. 2d 390 (9th Cir. 1967); United States v. Littlepage, 435 F. 2d 498 (5th Cir. 1970); United States v. Essex, 275 F. Supp. 393 (E.D. Tenn. 1968) rev'd. on other grounds 407 F. 2d 214; United States v. Manni, 270 F. Supp. 103 (D. Mass. 1967) aff'd. 391 F. 2d 922; State v. Hunt, 447 P. 2d 896 (Ariz. App. 1968); Stout v. State, 426 S.W. 2d 800 (Ark. 1968); People v. Butterfield, 65 Cal. Rptr. 765 (Cal. App. 1968); Jackson v. State, 259 A. 2d 587 (Md. App. 1969); Commonwealth v. Cutler, 249 N.E. 2d 632 (Mass. 1969); People v. Brosnan, 299 N.Y.S. 2d 263 (N.Y. App. 1969); State v. Williams, 168 S.E. 2d 217 (N.C. App. 1969); Commonwealth v. Barclay, 240 A. 2d 839 (Pa. App. 1968); Bendaw v. State, 429 S.W. 2d 506 (Texas 1968); Jones v. State, 442 S.W. 2d 698 (Texas 1969); State v. Bower, 440 P. 2d 167 (Wash. 1968).

E. Places of Business—Interrogation of a suspect in his place of business is usually non-custodial. As in the case of homes, the place of business represents a familiar surrounding. See United States v. Berkowitz, 429 F. 2d 921 (1st Cir. 1970) (defendant questioned in his own store, ostensibly cooperating with police); United States v. Gallagher, 430 F. 2d 1222 (7th Cir. 1970) (suspect's law office); United States v. Fayette, 388 F. 2d 728 (2nd Cir. 1968); United States v. Webb, 398 F. 2d 553 (4th Cir. 1968) (I.C.C. agent who had no power to arrest); Archer v. United States, 393 F. 2d 124 (5th Cir. 1968); White v. United States, 395 F. 2d 170 (8th Cir. 1968); United States v. Dudgeon, 279 F. Supp. 300 (D. Mass. 1967) (F.D.A. inspector who had no power to arrest); United States v. Delamarra, 275 F. Supp. 1 (D.C. 1967); United States v. Roth, 285 F. Supp. 364 (S.D. N.Y. 1968); United States v. Morton Provision Co., 294 F. Supp. 285 (Del.

1968). See also United States v. Prudden, 424 F. 2d 1021 (5th Cir. 1970).

Several state courts have reached similar results. See State v. Hall, 468 P. 2d 598 (Ariz. App. 1970); State v. Carpenter, 435 P. 2d 789 (Idaho 1968); People v. Robinson, 177 N.W. 2d 234 (Mich. App. 1970); State v. Boykin, 172 N.W. 2d 754 (Minn. 1969); State v. Lipker, 241 N.E. 2d 171 (Ohio App. 1968); Tate v. State, 413 S.W. 2d 366 (Tenn. 1967); Brown v. State, 437 S.W. 2d 828 (Texas 1968); Robinson v. State, 441 S.W. 2d 855 (Texas 1969). State v. McLam, 478 P. 2d 570 (N.M. App. 1970). In one interesting case the Court pointed out that when a policeman is being questioned—his police station is his place of business. People v. Williams, 290 N.Y.S. 2d 321 (Sup. Ct. 1968).

The making of an actual arrest, however, renders the interrogation custodial even if it is in the suspect's place of business. See People v. Ryff, 284 N.Y.S. 2d 953 (N.Y. App. 1967).

F. Stores and Places of Public Accommodations—The rationale of familiar surroundings applicable to questioning in homes and offices does not invariably apply when the interrogation occurs in a restaurant or bar. However, the usual view in such cases is that the interrogation is not custodial. This result is due to the fact that the suspect is, if not in a completely familiar place, at least in a place of his own choosing. Another significant factor is the lack of isolation from the outside world and the distinct absence of police station atmosphere. See United States v. Charpentier, —— F. 2d —— (10th Cir. 1971) (Salvation Army Building lobby); Lucas v. United States, 408 F. 2d 835 (9th Cir. 1969) (night club); United States v. Messina, 388 F. 2d 393 (2nd

Cir. 1968) (park bench and restaurant); Perry v. United States, 230 A. 2d 721 (D.C. 1967) (Hallway of a hotel); Williams v. State, 232 So. 2d 366 (Miss. 1970) (cafe); State v. Zachmeier, 441 P. 2d 737 (Mont. 1968) (tavern).

In People v. Beasley, 58 Cal. Rptr. 485 (Cal. App. 1967) two police officers questioned the suspect in a pawnshop after he pawned goods the officers believed were stolen. The questioning was held non-custodial as was a similar interrogation in People v. Hazel, 60 Cal. Rptr. 437 (Cal. App. 1967). But see People v. Orf, 472 P. 2d 123 (Colo. 1970) (Tavern—opinion relies on existence of focus).

G. Government Offices—The questioning of persons at government offices presents a situation in which the rationale of familiar surroundings is inapplicable (except for the employees at the office). Nevertheless, the Courts have usually construed such questioning as non-custodial. Support for these rulings is found in the fact that the offices in question do not create a "police dominated" atmosphere. Often the personnel asking the questions have no power of arrest and the questions asked are few. Further, the decided cases deal mostly with draft resisters and the Courts probably tend to view the statements of such persons as volunteered in spirit, if not in fact. See United States v. Holmes, 387 F. 2d 781 (7th Cir. 1967); Fults v. United States, 395 F. 2d 852 (10th Cir. 1968); Noland v. United States, 380 F. 2d 1016 (10th Cir. 1967); United States v. Kroll, 402 F. 2d 221 (3rd Cir. 1968). See United States v. Hamlin, 432 F. 2d 905 (5th Cir. 1970) (the defendant appeared uninvited at postal inspector's office to discuss his new brochure, the inspector then discussed inquiries his office had received concerning the brochure, thereafter the defendant met with the postal inspector on several occasions—Miranda was held inapplicable to any of the conversations).

H. Hospitals—Questioning of a suspect who is confined in a hospital as a patient but who is not under arrest is not custodial interrogation. State v. District Court, 432 P. 2d 93 (Mont. 1967). (Sheriff questioned prime suspect in murder who was confined as a private patient in a hospital); People v. Gilbert, 154 N.W. 2d 800 (Mich. 1967). (Police in hospital questioned a defendant walking around the emergency room who was involved in an auto accident and whose breath smelled of liquor).

In State v. Zucconi, 235 A. 2d 193 (N.J. 1967) the defendant was involved in a fatal auto accident and the principal evidence against him were his admissions on two separate occasions to an interrogating State Trooper that he was driving the car. The Court said, "In the present case defendant never was in the custody of the police nor was he deprived of his freedom by authorities. The questioning here took place in defendant's hospital room and at his home, surroundings totally lacking in the compelling atmosphere inherent in the process of in-custody interrogation." 235 A. 2d at 194. See also: Lamb v. United States, 414 F. 2d 250 (9th Cir. 1969); State v. Sandoval, 452 P. 2d 350 (Idaho 1969) (definite suspect questioned at hospital); Tillery v. State, 238 A. 2d 125 (Md. App. 1968) (Person interviewed was thought to be a shooting victim); State v. Mitchell, 163 N.W. 2d 310 (Minn. 1968) (Suspect interviewed at hospital about possible homicide after death of wife in house fire); State v. Rudd, 230 A. 2d 129 (N.J. 1967); State v. Lopez, 442 P. 2d 594 (N.M. 1968); State v. Webb, 469 P. 2d 153 (N.M. App. 1970); People v. Phinney, 239 N.E. 2d 515 (N.Y. 1968) (single question); Commonwealth v. Bordner, 247 A. 2d 612 (Pa. 1968) (routine investigation); Commonwealth v. Frye, 252 A. 2d 580 (Pa. 1969) (suspect visited victim at hospital and claimed to be victim's brother); State v. Kelter, 426 P. 2d 500 (Wash. 1967).

The cases dealing with hospital interviews have relied on the routine nature of the inquiry and on the lack of objective indicia of custody (See Point IV). The physical condition and drug intake of the suspect are also considered, though logically these factors have nothing to do with Miranda. The existence of pain and drug intake affects voluntariness and waiver—they really have nothing to do with the determination of custody.

Hospital interviews, however, have often been held custodial in nature. The citations are: Howard v. State, 217 So. 2d 548 (Ala. App. 1969); Robinson v. State, 224 So. 2d 675 (Ala. App. 1969); People v. Vaiza, 52 Cal. Rptr. 733 (Cal. App. 1966) (intent to incriminate suspect); People v. Braun, 241 N.E. 2d 25 (Ill. App. 1968) (suspect informed that officers had a ticket for him); Thomas v. State, 238 A. 2d 558 (Md. App. 1968); State v. Evans, 439 S.W. 2d 170 (Mo. 1969); State v. Ross, 157 N.W. 2d 860 (Neb. 1968) (suspect in pain and under sedation); Shedrick v. State, 271 A. 2d 733 (Md. App. 1970) (two officers with suspect in small room when suspect knew of the serious condition of the victim); People v. Tanner, 295 N.Y.S. 2d 709 (N.Y. App. 1968) (relay questioning); Vandegriff v. State, 409 S.W. 2d 370 (Tenn. 1966).

I. Automobiles.

Although most cases in which a suspect is questioned in his automobile are usually resolved on the theory that a traffic stop does not constitute custody (Section I, K.)—there are some cases emphasizing the fact that a suspect in his own car is in familiar surroundings. Under either rationale these cases generally find a lack of custody. See Chavez-Martinez v. United States, 407 F. 2d 535 (9th

Cir. 1969); Williams v. United States, 381 F. 2d 20 (9th Cir. 1967) (defendant stopped his car himself at a border station); United States v. Montos, 421 F. 2d 215 (5th Cir. 1970); United States v. Littlejohn, 260 F. Supp. 278 (S.D.N.Y. 1966); United States v. Montez-Hernandez, 291 F. Supp. 712 (S.D. Cal. 1968); State v. Tellez, 431 P. 2d 691 (Ariz. App. 1967); State v. Thomas, 454 P. 2d 153 (Ariz. 1969); People v. Allison, 57 Cal. Rptr. 635 (Cal. App. 1967); People v. Stewart, 73 Cal. Rptr. 484 (Cal. App. 1968); State v. Rodgers, 207 So. 2d 755 (La. 1968); Jones v. State, 234 A. 2d 900 (Md. App. 1967); Cornish v. State, 251 A. 2d 23 (Md. App. 1969) (the defendant stopped his car on his own volition); People v. Johnson, 271 N.Y.S. 2d 814 (Sup. Ct. 1966); State v. Miller, 151 N.W. 2d 157 (Wis. 1967) (The defendant was driving his car to the police station with a policeman as passenger). Contra: People v. McFall, 66 Cal. Rptr. 277 (Cal. App. 1968); People v. Ceccone, 67 Cal. Rptr. 499 (Cal. App. 1968).

The situation in which a suspect is questioned in his own car is also commonly dealt with under the rubric of on-the-scene questioning (Section I, K).

J. Crime Scenes. In Miranda the Court said that its decision was "not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." 384 U.S. at 477-78.

The scope of this language has been the subject of many decisions.

Generally speaking, questioning of a suspect prior to arrest near the scene of a crime is not custodial interrogation. United States v. Davis, 259 F. Supp. 496 (D. Mass. 1969) (Wyszanski, J.) (Customs officers find narcotics and questioned defendant about them without warnings); United States v. Small, 297 F. Supp. 582 (D. Mass. 1969) (Questioning of suspect at a locker where marijuana was stored); Laury v. State, 260 A. 2d 907 (Del. 1969) (accosting suspect at robbery scene); Nevels v. State, 216 So. 2d 529 (Miss. 1968) (Questions at the end of a chase and search); People v. Schhwartz, 292 N.Y.S. 2d 518 (N.Y. App. 1968) (Two questions of person leaving scene of reported assault); State v. Gray, 150 S.E. 2d 1 (N.C. 1966) (Suspect voluntarily went to home of victim where larceny occurred); State v. Shedd, 161 S.E. 2d 650 (N.C. 1968) (Burglar caught on premises; questioning after arrest); New v. State, 259 N.E. 2d 696 (Ind. 1970). See also State v. Brown, 176 N.W. 2d 180 (Iowa 1970); State v. Dubany, 167 N.W. 2d 556 (Neb. 1969); State v. Carr, 154 N.W. 2d 526 (Neb. 1967); State v. Watts, 152 S.E. 2d 684 (S.C. 1967); Sutton v. State, 419 S.W. 2d 857 (Texas 1967); State v. Largo, 473 P. 2d 845 (Utah 1970) (Questioning of sixty boys residing in a dormitory concerning invasion of girl's dormitory and rape of one of the girls) Cf. State v. Phinis, 430 P. 2d 251 (Kans. 1967); Thompson v. State, 235 So. 2d 354 (Fla. App. 1970).

Several cases have reached the same conclusion with respect to questioning at the scene of an automobile accident. See State v. Lief, 234 A. 2d 124 (Conn. Cir. 1967); State v. Kinn, 178 N.W. 2d 888 (Minn. 1970); State

v. Beck, 268 A. 2d 416 (Conn. App. 1970); People v. Jendrzejak, 240 N.E. 2d 239 (Ill. App. 1968); People v. Routt, 241 N.E. 2d 206 (Ill. App. 1968); People v. Morgan, 180 N.W. 2d 508 (Mich. App. 1970); State v. Kinn, 178 N.W. 2d 888 (Minn. 1970); Ford v. State, 226 So. 2d 378 (Miss. 1969); People v. Alexander, 293 N.Y.S. 2d 138 (Co. Ct. 1968); State v. Hayes, 161 S.E. 2d 185 (N.C. 1968); State v. Taylor, 437 P. 2d 853 (Ore. 1968); State v. Desjardin, 272 A. 2d 599 (N.H. 1970).

The most commonly reported instance of on-the-scene questioning involves homicides.

In State v. Gosser, 236 A. 2d 377 (N.J. 1967) the defendant shot his wife. He then called a friend and in a distraught voice said that something terrible had happened and asked the friend to come over. Instead the friend called the police who went to the house. The defendant opened the door. He was groggy and crying; his pajamas and face were crusted with blood. The officer asked him what the trouble was and defendant answered that he killed his wife. The policeman told defendant to sit on the couch and remain there. The officer called for assistance. A sergeant arrived and again asked defendant what happened. The defendant answered that he shot his wife. The sergeant asked where she was. The defendant replied that she was upstairs. The officers and the defendant went upstairs where defendant volunteered some further information. Then they came downstairs where defendant was arrested. The Court said that these statements were the result of general on-the-scene questioning prior to arrest and were not open to challenge by defendant.

In State v. Oxentine, 154 S.E. 2d 529 (N.C. 1967) the defendant shot the victim in the defendant's home. The

police arrived and asked what happened. The defendant replied that he shot him. The Court held that the defendant was not in custody or deprived of his freedom and that the questioning did not fall within the meaning and intent of Miranda. "We do not interpret this important decision to exclude statements made at the scene of an investivation when nobody has been arrested, detained or charged."

In Tate v. State, 413 S.W. 2d 366 (Tenn. 1967) the defendant shot his boss at the office and his defense at trial was self-defense. Officers testified that they arrived on the scene and asked who did the shooting. In the presence of others defendant said that he did. The officers asked why and he said because the boss was firing him from his job. This questioning was held to be within the scope of general investigation.

In Britton v. State, 170 N.W. 2d 785 (Wis. 1969) an officer summoned to the scene of a shooting was told that the assailant fled into a gangway. The officer went into the gangway and asked the man he saw there if he was involved. The reply was, "Yeh, I shot him." Miranda was held inapplicable.

Similar holdings are found in: Truex v. State, 210 So. 2d 424 (Ala. 1968) ("What happened?"); Ison v. State, 200 Sd. 2d 511 (Ala. 1967) ("Did you shoot him?"); Stout v. State, 426 S.W. 2d 800 (Ark. 1968) (Officers summoned about a dead body); People v. Stewart, 59 Cal. Rptr. 71 (Cal. App. 1967); People v. Morse, 452 P. 2d 607 (Cal. 1969) (At jail where one inmate kills another); Green v. State. 157 S.E. 2d 257 (Ga. 1967) (At scene of shooting defendant surrenders a revolver and then admits shooting); People v. Bey, 259 N.E. 2d 800 (Ill. 1970); Carrington v. State, 230 A. 2d 112 (Md. App.

1967); Weissinger v. State, 218 So. 2d 432 (Miss. 1969) ("Where is the gun?"); People v. Williford, 311 N.Y.S. 2d 461 (N.Y. App. 1970); State v. Meadows, 158 S.E. 2d 638 (N.C. 1968); ("What happened?") Commonwealth v. Lopinson, 234 A. 2d 522 (Pa. 1967) rev'd on other grounds 392 U.S. 647; Ballard v. State, 454 S.W. 2d 193 (Tenn. App. 1969); Bell v. State, 442 S.W. 2d 716 (Texas 1969) ("What happened?"); State v. Nuckols, 459 P. 2d 979 (Wash. App. 1969); Cf. State v. Tarrance, 211 So. 2d 304 (La. 1968).

The crime scene situation as well as several others, i.e., street encounters, traffic stops, and stop and frisk usually give rise to the problem of the officer who will testify that if the suspect had tried to leave, the officer would have stopped him. This should not create a custodial situation as long as such an intent to stop is unvoiced. However, it seems to me that even if the officer at the scene of a crime asks one or more persons to remain at the scene—this should not be thought to establish custody. The Court in Miranda referred to deprivation "of freedom of action in any significant way" and declared that its opinion did not apply to "general, on-the-scene interviews and that "it is an act of responsible citizenship" for persons to give information to the police. It can be persuasively argued that the Court envisioned the brief retention of all potential witnesses at the scene of a crime and excluded this kind of interviewing from Miranda. An ordinary innocent person directed by an officer not to leave the scene of a crime would not consider himself in custody or under arrest and there is no reason for a court to do so. See in this connection: Arnold v. United States, 382 F. 2d 4 (9th Cir. 1967); People v. Alexander, 293 N.Y.S. 2d 138 (Co. Ct. 1968). State v. Rogers, 236 So. 2d 715 (La. 1970); People v. Morgan, 180 N.W. 2d 508 (Mich. App. 1970).

K. Street Encounters—"On the Scene"

Another form of general on the scene questioning occurs when an officer makes inquiries of persons on the public ways under suspicious circumstances. See Jennings v. United States, 391 F. 2d 512 (5th Cir. 1968) (While an officer was examining suspect car, defendant came up to car and made damaging admissions in ensuing conversation); United States v. Gibson, 392 F. 2d 373 (4th Cir. 1968) (brief inquiries of suspect on sidewalk); Arnold v. United States, 382 F. 2d 4 (9th Cir. 1968) (Suspect asked to step away from crowd); United States v. Agy, 374 F. 2d 94 (6th Cir. 1967); United States v. Thomas, 396 F. 2d 310 (2nd Cir. 1968) (Suspect prowling in railroad yard); United States v. Diaz, 427 F. 2d 636 (1st Cir. 1970) (hitchhiker-request for identity); United States v. Clark, 294 F. Supp. 1108 (E.D. Pa. 1968) (suspect running on street, stopped by officer). Where an officer simply finds someone he is seeking in the street and makes inquiries this too is non-custodial, United States v. Owens, 431 F. 2d 349 (5th Cir. 1970).

State courts have generally reached the same conclusion as the cited federal cases: Lockridge v. Superior Court, 80 Cal. Rptr. 223 (Cal. App. 1969) (Person descending from telephone pole within 100 feet of store where alarm was set off); People v. Sjosten, 68 Cal. Rptr. 832 (Cal. App. 1968); State v. Caha, 165 N.W. 2d 362 (Neb. 1969); People v. Cartwright, 182 N.W. 2d 811 (Mich. App. 1970) (Two persons stopped in the vicinity of a break-in); People v. Fairley, 301 N.Y.S. 2d 1013 (N.Y. App. 1969) (At gasoline station—suspect initiated conversation); People v. McKie, 250 N.E. 2d 36 (N.Y. 1969) (On the street—suspect initiated conversation); People v. Milligen, 245 N.E. 2d 551 (Ill. App. 1969) (person near

burglarized premises); Gaudio v. State, 230 A. 2d 700 (Md. App. 1967) (Defendant after traffic arrest was waiting to post bond and standing near his truck when officers asked him about smuggling cigarettes); Hall v. State, 251 A. 2d 219 (Md. App. 1969); People v. Patten, 166 N.W. 2d 284 (Mich. App. 1968) (Officer asked suspect what he was doing on a certain truck); State v. Bradford, 434 S.W. 2d 497 (Mo. 1968) (Suspects seated in car in parking lot of closed establishment at odd hours); State v. Perry, 237 N.E. 2d 891 (Ohio 1968) (Person stopped while running from a building); State v. Whitney, 431 P. 2d 711 (Wash. 1967) (Suspect walking on highway near car known to be stolen, the officers ask if the car is his); State v. Huson, 440 2d 192 (Wash. 1968). State v. Bosford, 467 P. 2d 352 (Wash. App. 1970). See also People v. Kenney, 279 N.Y.S. 2d 198 (Sup. Ct. 1966); State v. Woodall, 241 N.E. 2d 755 (Ohio C.P. 1968).

The basic premise underlying these decisions is that the officers were confronted with suspicious circumstances which could have been resolved with an explanation from the person questioned. The absence of a custodial atmosphere is significant but the investigative nature of the encounter is foremost.

Of course, under certain circumstances street and scene encounters may be deemed custodial. See Allen v. United States, 404 F. 2d 1335 (D.C. Cir. 1968); People v. Chavira, 61 Cal. Rptr. 407 (Cal. App. 1967); State v. Shaffner, 143 N.W. 2d 458 (Wis. 1966).

II.

THE TIME OF THE DAY THE INTERROGATION OCCURS

An interview conducted in a non-custodial setting during normal business hours is more likely to be found non-custodial than one which is conducted at an odd hour of the night.

The intrusion of police in the early morning hours to make inquiries would support a reasonable man's belief that he might be in custody. See Orozco v. Texas, 394 U.S. 324 (1969). Of course, on the scene questioning shortly after the commission of a crime may permissibly take place at odd hours but seeking out someone some distance away from the scene as was done in Orozco tends to support a finding that the interrogation was custodial.

III.

THE PERSONS PRESENT AT THE INTERROGATION

The language of Miranda evinces concern for a suspect "cut off from the outside world" 384 U.S. at 445. It follows that the presence of friends or neutrals at an interview is a fact of some relevance. See 384 U.S. at 461, 478 n. 46.

Accordingly, several courts have considered the presence of friends as indicative of non-custody. United States v. Owens, 431 F. 2d 349 (5th Cir. 1970). (Defendant's friends); Archer v. United States, 393 F. 2d 124 (5th

Cir. 1968) (Suspect's husband); United States v. Manni, 270 F. Supp. 103 (D. Mass. 1967); aff'd. 391 F. 2d 922 (1st Cir. 1968) (suspect's wife); State v. Noriega, 433 P. 2d 281 (Ariz. App. 1967) (suspect's family); State v. Tellez, 431 P. 2d 691 (Ariz. App. 1967) (suspect's friends); Stout v. State, 426 S.W. 2d 800 (Ark. 1968) (suspect's wife); People v. Butterfield, 65 Cal. Rptr. 765 (Cal. App. 1968) (suspect's mother); State v. Davis, 157 N.W. 2d 907 (Iowa 1968) (Doctor and nurses); Jones v. State, 234 A. 2d 900 (Md. App. 1967) (Suspect's girlfriend); McFadden v. State, 231 A. 2d 910 (Md. App. 1967) (suspect's wife); People v. Allen, 281 N.Y.S. 2d 602 (N.Y. App. 1967) (suspect's family); State v. Gray, 150 S.E. 2d 1 (N.C. 1966) (suspect's cousin); Commonwealth v. Barclay, 240 A. 2d 839 (Pa. App. 1968) (suspect's family); State v. Largo, 473 P. 2d 895 (Utah 1970) (school counselors).

See generally: United States v. Hall, 421 F. 2d 540 (2nd Cir. 1969); State ex rel Lowe v. Nelson, 202 So. 2d 232 (Fla. App. 1967); Franklin v. State, 151 S.E. 2d 191 (Ga. App. 1966); People v. Rogers, 165 N.W. 2d 337 (Mich. App. 1968); People v. Cerrato, 246 N.E. 2d 501 (N.Y. 1969). But see People v. Bryant, 231 N.E. 2d 4 (Ill. App. 1967); People v. Anon, 294 N.Y.S. 2d 248 (Sup. Ct. 1968).

By the same token the deliberate removal of a suspect from the presence of his family and friends tends to support a finding of custody. Commonwealth v. Sites, 235 A. 2d 387 (Pa. 1967) Cf. Pemberton v. Peyton, 288 F. Supp. 920 (E.D. Va. 1968) (driving a suspect 65 miles to give polygraph and then interrogating him without giving the polygraph).

The "balance of power" may also be significant in cases where the sheer number of police is inferential of

police dominated atmosphere. See Orozco v. Texas, 394 U.S. 324 (1969); Fisher v. Scafati, 314 F. Supp. 929 (D. Mass. 1970) (Three police officers with suspect in one room); Shedrick v. State, 271 A. 2d 773 (Md. App. 1970) (two officers and one suspect in a small room); State v. Ross, 157 N.W. 2d 860 (Neb. 1968); People v. Paulin, 305 N.Y.S. 2d 605 (Sup. Ct. 1969) aff'd. 308 N.Y.S. 2d 883 (N.Y. App. 1969) aff'd. 255 N.E. 2d (N.Y. 1969); Underwood v. State, —— S.W. 2d —— (Tenn. App. 1970) (Questioned alone by judge and two probation officers). Presumably the reverse is true and the officer who is significantly outnumbered by suspects or a suspect's friends may be found to have conducted a non-custodial interview. See People v. Robinson, 177 N.W. 2d 234 (Mich. App. 1970) (single officer). In People v. Morgan, 180 N.W. 2d 508 (Mich. App. 1970) a request by an officer at the scene of an accident addressed to 50 to 75 bystanders asking who was the driver was not custodial interrogation.

The fact that the interviewer is a uniformed policeman does not render the interview per se custodial. State v. Hall, 468 P. 2d 598 (Ariz. App. 1970). People v. Rodney, P. 233 N.E. 2d 255 (N.Y. 1967); State v. Meunier, 224 A. 2d 922 (Vt. 1966). But the presence of a uniformed officer has been considered as one circumstance supporting a finding of custody. See People v. Bliss, 278 N.Y.S. 2d 732 (Sup. Ct. 1967).

IV.

THE INDICIA OF FORMAL ARREST

A. Physical Restraint The Courts have generally recognized the existence of physical restraint is a significant factor in determining questions of custody. The opinion

in Miranda recognizes the significance of physical restraint. See 384 U.S. at 461, 477.

The absence of physical restraint has led several courts to the conclusion that the defendant was not under arrest or in custody. United States v. Fiorillo, 376 F. 2d 180 (2d Cir. 1967) (telephone conversation with suspect); People v. Hill, 452 P. 2d 329 (Cal. 1969) (same); People v. Ragen, 68 Cal. Rptr. 700 (Cal. App. 1968) (same); People v. Merchant, 67 Cal. Rptr. 459 (Cal. App. 1968) (police asked questions from outside locked screen door). People v. Cartwright, 182 N.W. 2d 811 (Mich. App. 1970). See United States v. Gallagher, 430 F. 2d 1222 (7th Cir. 1970) ("free to come and go as he pleased"). But the lack of physical restraint does not automatically mean non-custody. U.S. v. Bekowies, 432 F. 2d 8 (9th Cir. 1970).

The existence of physical restraint has invariably led to a finding of custody. United States v. Averell, 296 F. Supp. 1004 (S.D. N.Y. 1969) (handcuffing); State v. Saunders, 435 P. 2d 39 (Ariz. 1967) (Officer placed his hand on suspect's arm and led him to patrol car); State v. Michael, 436 P. 2d 595 (Ariz. 1968) (same); People v. Connor, 75 Cal. Rptr. 905 (Cal. App. 1969) (handcuffing); Myers v. State, 240 A. 2d 288 (Md. App. 1968) (suspect pulled into patrol car); People v. McKay, 287 N.Y.S. 2d 795 (N.Y. App. 1968) (officer wrapped arms around suspect, then handcuffed him); Commonwealth v. Moody, 239 A. 2d 409 (Penn. 1968) (handcuffing).

B. Other Restraint The courts also recognize that in certain cases restraint may be non-physical in nature but the drawing of lines is not simple. In People v. Gilbert, 175 N.W. 2d 547 (Mich. App. 1970) a suspect was asked to come to a police car and there informed of an accusa-

tion of rape. The Court found custody. In Priestly v. State, 446 P. 2d 405 (Wyo. 1968) custody was found where the officer told the suspect to get into the police car. Formal arrest, of course, establishes custody even without physical restraint, United States v. Droz, 427 F. 2d 636 (1st Cir. 1970).

On the other hand, the mere request of an officer to a suspect to step aside does not create a custodial situation. United States v. Arnold, 382 F. 2d 4 (9th Cir. 1967); People v. Rodney P. 233 N.E. 2d 255 (N.Y. 1967). Nor does a request to step outside a cafe for routine questions create custody. United States v. Gibson, 392 F. 2d 373 (4th Cir. 1968). Contra, People v. Orf, 472 P. 2d 123 (Colo. 1970).

C. The Use of Weapons Holding a gun on a suspect creates a clearly custodial situation. State v. Intogna, 419 P. 2d 59 (Ariz. 1967); People v. Shivers, 233 N.E. 2d 836 (N.Y. 1967). But Cf. State v. Goudy, 479 P. 2d 800 (Hawaii 1971).

The fact that a suspect is himself armed should be weighed strongly against a finding of custody. See Yates v. United States, 384 F. 2d 586 (5th Cir. 1967); Ison v. State, 200 So. 2d 511 (Ala. 1967). This sort of situation is not rare. Armed felons often make damaging admissions when holding off police. See People v. Tahl, 423 P. 2d 246 (Cal. 1967). And an officer who arrives at the scene of a shooting may also find that his suspect is armed.

D. Searches and Booking Procedures It has been recognized in the earliest cases that the absence of fingerprinting, photographing and other booking precedures are indicative of the non-custodial interview. Hicks v. United States, 382 F. 2d 158 (D.C. Cir. 1967). See People

v. Robinson, 177 N.W. 2d 234 (Mich. App. 1970). The use of booking procedures leads to the contrary conclusion. See People v. Ellingsen, 65 Cal. Rptr. 744 (Cal. App. 1968) (fingerprinting and removal of clothes); People v. Connor, 75 Cal. Rptr. 69 (Cal. App. 1969) (booking)

Similarly, the absence of frisk or search helps to show absence of custody United States v. Thomas, 396 F. 2d 310 (2nd Cir. 1968). The reverse is true. United States v. Averell, 296 F. Supp. 1004 (S.D. N.Y. 1969); Commonwealth v. Moody, 239 A. 2d 409 (Pa. 1968).

A related problem arises when a suspect is interviewed on premises where the officer is executing a search warrant. A single question to a suspect whose apartment was being searched was held permissible in People v. Cerrato, 246 N.E. 2d 501 (N.Y. 1969); People v. Fischetti, 264 N.E. 2d 191 (Ill. 1970) (same). See also: State v. Gumins, 469 P. 2d 833 (Ariz. App. 1970); State v. Porter, 443 P. 2d 360 (Kan. 1968); People v. Torres, 233 N.E. 2d 282 (N.Y. 1967) (volunteered); Sutton v. State, 419 S.W. 2d 857 (Texas 1967) (defendant arrived at house during search and was asked where he lives); Brown v. State, 437 S.W. 2d 828 (Texas 1968); State v. Boykin, 172 N.W. 2d 754 (Minn. 1969) (officers serving warrant asked if defendant was the owner); Amos v. State, 234 So. 2d 630 (Miss. 1970); Contra: People v. Wilson, 74 Cal. Rptr. 131 (Cal. App. 1968). See United States v. Bekowies, 432 F. 2d 8 (9th Cir. 1970). Where the search is illegal the statements may be suppressed as fruits of the poisoned tree. People v. Hendricks, 250 N.E. 2d 323 (N.Y. 1969).

E. Statements and Demeanor of Officers The officer who tells a suspect that he is not under arrest and is free to leave at any time has fairly definitely established that the interview is non-custodial. See United States v.

Tobin, 429 F. 2d 1261 (8th Cir. 1970); Lucas v. United States, 408 F. 2d 835 (9th Cir. 1969); United States v. Maglona, 414 F. 2d 642 (9th Cir. 1969); Doran v. United States, 421 F. 2d 865 (9th Cir. 1970); Archer v. United States, 393 F. 2d 124 (5th Cir. 1968); United States v. Cortez, 425 2d 453 (6th Cir. 1970); United States v. Davis, 295 F. Supp. 496 (D. Mass. 1966); State v. Sherron, 463 P. 2d 533 (Ariz. 1970); Wingard v. State, 208 So. 2d 263 (Fla. App. 1968); Beason v. State, 453 P. 2d 283 (Okla. 1969); Robinson v. State, 441 S.W. 2d 855 (Texas 1969). The only exception to this rule has occurred in a jurisdiction which, at the time of the decision, used a pure focus concept to determine custody. See Windsor v. United States, 389 F. 2d 530 (5th Cir. 1968).

If a suspect is told he is under arrest then, of course, there is custody for Miranda purposes. In all such cases a reasonable man would reasonably conclude that he is in custody. It is clear that custody exists in all cases after formal arrest. People v. Hale, 69 Cal. Rptr. 28 (Cal. App. 1968); Duckett v. State, 240 A. 2d 332 (Md. App. 1968); Franklin v. State, 252 A. 2d 487 (Md. App. 1969). See Johnson v. Commonwealth, 160 S.E. 2d 793 (Va. 1968) (suspect told not to leave home after interview).

One special situation occurs when a suspect is in custody on other charges—under rule in Mathis he is in custody even if the officer tells him he could leave the interview room if he chooses. See Young v. State, 234 So. 2d 341 (Fla. 1970).

There are a scattering of cases relying on what the officer did not say concerning arrest. In State v. Caha, 165 N.W. 2d 362 (Neb. 1969) the Court relied partially on the fact that the suspect had never been told he was under arrest to negate custody. See also United States v.

Littlepage, 435 F. 2d 498 (5th Cir. 1970); People v. Cartwright, 182 N.W. 2d 811 (Mich. App. 1970). In People v. Ellingsen, 65 Cal. Rptr. 744 (Cal. App. 1968) the fact that a defendant was never told he was free to go was one circumstance leading to a finding of custody. See United States v. Lackey, 413 F. 2d 655 (7th Cir. 1969).

The fact that warnings are given does not mean that the suspect was in custody, United States v. Owens, 431 F. 2d 349 (5th Cir. 1970).

Finally, the demeanor of the officer may be significant. The higher the level of courtesy and deference the suspect—the more likely a court is to find that the suspect did not reasonably believe he was in custody. See State v. Bode, 261 A. 2d 396 (N.J. App. 1970) (Police chief questioning subordinate with the aim of protecting his fellow officer); Commonwealth v. Willman, 255 A. 2d 534 (Pa. 1969) (Friendly attitude of officers) The giving of unnecessary warnings has been thought to demonstrate an attitude of courteous consideration and thus support a finding of no custody, State v. McLam, 478 P. 2d 570 (N.M. App. 1970). Where, however, the officer is very accusatory and insistently confronts the suspect with evidence of his guilt, the argument that custody existed is strengthened. See People v. Arnold, 426 P. 2d 515 (Cal. 1967); Cf. United States v. Lackey, 413 F. 2d 655 (7th Cir. 1969) (Defendant was required to take an oath and the interview was tape recorded in small room.)

V.

THE LENGTH AND FORM OF QUESTIONS

The length and nature of the interrogation is of considerable significance. Almost all of the cases approving crime scene and street interrogations conducted without warnings rely upon the additional fact that questioning was brief—consuming little time and involving a few, very general inquiries.

The reliance of courts on brevity of interrogation occurs in two kinds of cases. First, there are situations in which the brief questioning aids a court in determining that there was no custody. These situations are dealt with here. Second, there are situations where the suspect is clearly in custody, i.e., in jail under arrest, and the court concludes that one or two questions do not, under the circumstances, constitute "interrogation." These situations are deal with in Point V.*

The cases on point rely both on the brevity and the nature of inquiries. Brief, routine police inquiries are indicative of a non-custodial interview designed to clarify a questionable situation. The leading case is probably Allen v. United States, 390 F. 2d 476 (D.C. Cir. 1968) modified 404 F. 2d 1335 where an officer stopped a car driven by defendant. There was a passenger in the car who was bleeding and injured. The driver gave some suspicious answers to the officer's questions and the officer asked the passenger if he had been beaten or by whom he had been beaten. The passenger mumbled in-

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*Point V of the original monograph deals with the nature and application of the concept of "interrogation."

coherently and pointed at the driver. The officer asked the driver if he had done it and the driver said yes. The Court held that the officer had to clarify the situation and that he did so properly by asking routine questions. The Court found that such questioning was permissible under Miranda and pointed out that warnings demean routine police investigation and make cooperative citizens nervous.

The Courts have generally reached the same result where short, neutral (non-accusatory) inquiries were put, i.e., Who are you? Where do you live? What are you doing here? Where do you come from? Is this car (or other item) yours? Where did you get it? etc. Sciberras v. United States, 380 F. 2d 732 (10th Cir. 1967); Arnold v. United States, 382 F. 2d 4 (9th Cir. 1967); United States v. Gibson, 392 F. 2d 373 (4th Cir. 1968); United States v. Thomas, 396 F. 2d 310 (2nd Cir. 1968); Chavez-Martinez v. United States, 407 F. 2d 535 (9th Cir. 1969); Lowe v. United States, 407 F. 2d 1491 (9th Cir. 1969); Virgin Islands v. Berne, 412 F. 2d 1055 (3rd Cir. 1969); United States v. Montes, 421 F. 2d 215 (5th Cir. 1970); United States v. Charpentier, —— F. 2d —— (10th Cir. 1971); Sharbor v. Gathright, 295 F. Supp. 386 (W.D. Va. 1969) (name); United States v. Diaz, 427 F. 2d 636 (1st Cir. 1970).

The relevant state cases are Truex v. State, 210 So. 2d 424 (Ala. 1968); State v. Reynolds, 436 P. 2d 142 (Ariz. App. 1968); Stout v. State, 426 S.W. 2d 800 (Ark. 1968); People v. Quicke, 455 P. 2d 787 (Cal. 1969); People v. Terry, 466 P. 2d 961 (Cal. 1970); People v. Alesi, 434 P. 2d 360 (Cal. 1967); People v. Allison, 57 Cal. Rptr. 635 (Cal. App. 1968); People v. Wright, 66 Cal. Rptr. 995 (Cal. App. 1968); People v. Hazel, 60 Cal. Rptr. 437 (Cal.

App. 1967); People v. Bolinski, 67 Cal. Rptr. 347 (Cal. App. 1968); People v. Manis, 74 Cal. Rptr. 423 (Cal. App. 1969); Lockridge v. Superior Court, 80 Cal. Rptr. 223 (Cal. App. 1969); People v. Henera, 90 Cal. Rptr. 802 (Cal. App. 1970); White v. United States, 222 A. 2d 843 (D.C. 1966); People v. Routt, 241 N.E. 2d 206 (Ill. App. 1968); Duffy v. State, 221 A. 2d 653 (Md. 1966); People v. Robinson, 177 N.W. 2d 234 (Mich. App. 1970); State v. Brandford, 434 S.W. 2d 497 (Mo. 1968); Schnepp v. State, 437 P. 2d 84 (Nev. 1968); People v. Rodney P., 233 N.E. 2d 255 (N.Y. 1967); People v. Phinney, 239 N.E. 2d 515 (N.Y. 1968); People v. Cerrato, 246 N.E. 2d 501 (N.Y. 1969); State v. Meadows, 158 S.E. 2d 638 (N.C. 1968); State v. Lipker, 241 N.E. 2d 171 (Ohio App. 1968); Commonwealth v. Bordner, 247 A. 2d 612 (Pa. 1968); State v. Watts, 162 S.E. 2d 684 (S.C. 1967); Sutton v. State, 419 S.W. 2d 857 (Texas 1967); State v. Whitney, 431 P. 2d 711 (Wash. 1967); State v. Bosford, 467 P. 2d 352 (Wash. App. 1967); State v. Lister, 469 P. 2d 597 (Wash. App. 1970).

The existence of lengthy interrogations indicates custody. See People v. Ryff, 284 N.Y.S. 2d 953 (N.Y. App. 1967); State v. Skiffer, 218 So. 2d 313 (La. 1969). The use of relay questioning is highly damaging to a contention of no custody. People v. Tanner, 295 N.Y.S. 2d 709 (N.Y. App. 1968); People v. Ellingsen, 65 Cal. Rptr. (Cal. App. 1968). Repeated interviews lead to similar inferences. Commonwealth v. Banks, 239 A. 2d 416 (Pa. 1968). In United States v. Bekowies, 432 F. 2d 8 (9th Cir. 1970) the Court relied heavily upon the presence of close and persistent questioning to establish custody.

The use of accusatory and leading questions is not helpful to the argument that no custody existed. State v.

Evans, 439 S.W. 2d 170 (Mo. 1969). Confronting the suspect with evidence against him People v. Arnold, 426 P. 2d 515 (Cal. 1967)); Underwood v. State, —— S.W. 2d —— (Tenn. App. 1970) and discounting the suspect's denials are also indicative of custody. People v. White, 446 P. 2d 993 (Cal. 1968); Commonwealth v. Sites, 235 A. 2d 387 (Pa. 1967).

The logic behind the latter cases is that confrontation and accusation by the police in many situations would give rise to a reasonable belief in an innocent man that the police think he had committed a crime and that his arrest is either imminent or is an accomplished fact.

Finally, those courts that use the concept of focus may approve routine interrogation on the additional grounds that the routine nature of the inquiry tends to show lack of focus.

VI.

THE SUMMONING OF POLICE AND INITIATION OF INTERVIEWS

The fact that a suspect summons the police and/or initiates the interview supports the premise that the interview was non-custodial. The rationale is similar to that underlying the admission of volunteered statements —the element of compulsion is lacking and the statements are not solely the result of police action. It may also be thought that where the suspect initiates contact with the police, the police are likely not to assume, at least in the beginning, that he is a guilty party.

In People v. Lee, 308 N.Y.S. 2d 412 (N.Y. App. 1970) the defendant flagged down a police car and stated that he shot a would be robber (who was the true victim).

The Court held that the defendant was not in custody when the police questioned him about the incident. In State v. Huson, 440 P. 2d 192 (Wash. 1968) the defendant arranged for an officer to pick him up at an agreed place—the conversation at the agreed place was held not custodial. See also Davidson v. United States, 371 F. 2d 994 (10th Cir. 1966); Stout v. State, 426 S.W. 2d 800 (Ark. 1968); Beeks v. State, 167 S.E. 2d 156 (Ga. 1969); People v. Routt, 241 N.E. 2d 206 (Ill. App. 1968); Spell v. State, 253 A. 2d 919 (Md. App. 1969); Commonwealth v. Cutler, 249 N.E. 2d 632 (Mass. 1969); People v. Bey, 259 N.E. 2d 800 (Ill. 1970); See Schmidt v. State, 265 N.E. 2d 219 (Ind. 1970); Lipps v. State, 258 N.E. 2d 322 (Ind. 1970); State v. Zachmeier, 441 P. 2d 737 (Mont. 1968); People v. Yukl, 256 N.E. 2d 172 (N.Y. 1969); People v. Fairley, 301 N.Y.S. 2d 1013 (N.Y. App. 1969). See State v. Meeks, 469 P. 2d 302 (Kan. 1970).

One who volunteers to go down to a police station to give evidence as a witness is not in custody. People v. Hill, 452 P. 2d 329 (Cal. 1969); United States v. Posey, 416 F. 2d 545 (5th Cir. 1969). Similarly, a defendant who, for his own purposes of using the agent as an intermediary, sought out a man known to be a state agent is not in custody. Adjmi v. State, 208 So. 2d 859 (Fla. App. 1968).

On the other hand, police insistence on interviewing a suspect at 4 A.M. when they had been told he was asleep was inferential of custody. See Orozco v. Texas, 394 U.S. 324 (1969).

VII.

THE LACK OF ARREST AFTER THE INTERVIEW

The fact that a suspect was arrested immediately following an interview does not mean the interview was necessarily custodial. In nearly every case dealing with non-custodial interviews the suspect was, in fact, promptly arrested afterwards. One court has considered the subsequent arrest to relate back but only because the charge was in the nature of a pretext. United States v. Bekowies, 432 F. 2d 8 (9th Cir. 1970).

However, the case where a suspect is allowed to go free after the interview is almost certainly one in which the interrogation is non-custodial. See Evans v. United States, 377 F. 2d 535 (5th Cir. 1967); Nobles v. United States, 391 F. 2d 602 (5th Cir. 1968); United States v. Manglona, 414 F. 2d 642 (9th Cir. 1969); United States v. Scully, 415 F. 2d 680 (2nd Cir. 1969); Virgin Islands v. Berne, 412 F. 2d 1055 (3rd Cir. 1969); United States v. Littlepage, 435 F. 2d 498 (5th Cir. 1970); United States v. Clark, 294 F. Supp. 1108 (E.D. Pa. 1968); Sharbor v. Gathright, 295 F. Supp. 386 (W.D. Va. 1969); United States v. Kubik, 266 F. Supp. 501 (S.D. Iowa 1967); United States v. Knight, 261 F. Supp. 843 (E.D. Pa. 1966).

See also: State v. Hunt, 447 P. 2d 896 (Ariz. App. 1968); State v. Hall, 468 P. 2d 598 (Ariz. App. 1970); People v. Singleton, 63 Cal. Rptr. 423 (Cal. App. 1967); People v. Butterfield, 65 Cal. Rptr. 765 (Cal. App. 1968); Thompson v. State, 235 So. 2d 354 (Fla. App. 1970); Commonwealth v. O'Toole, 233 N.E. 2d 887 (Mass. 1967) approved in O'Toole v. Scafati, 386 F. 2d 168 (1st Cir. 1968); People v. Rogers, 165 N.W. 2d 337 (Mich. App.

968); State v. Seefeldt, 242 A. 2d 322 (N.J. 1968); People v. Williams, 290 N.Y.S. 2d 321 (Sup. Ct. 1968); State v. Williams, 168 S.E. 2d 217 (N.C. App. 1969); State v. Travis, 441 P. 2d 597 (Ore. 1968); Jones v. State, 442 SW. 2d 698 (Texas 1969); State v. Lister, 469 P. 2d 597 (Wash. App. 1970). Contra: Underwood v. State, —— S.W. 2d ——, (Tenn. App. 1970).

VIII.

STATEMENTS CONSTITUTING THE CRIME

Where a suspect in custody attempts to bribe an officer—his statement constitutes a crime in itself and is probably admissible even though he may make the bribe offer during a period of custodial interrogation without having received warnings. See Vinyard v. United States, 335 F. 2d 176 (8th Cir. 1964); United States v. Perdiz, 256 F. Supp. 805 (S.D. N.Y. 1966) (illegal arrest precedes bribe offer); State v. McKinley, 234 N.E. 2d 611 (Ohio App. 1967); People v. Ricketson, 264 N.E. 2d 220 (Ill. App. 1970) ("you take the stuff and we will go"); Cf. Commonwealth v. French, 259 N.E. 2d 195 (Mass. 1970). The same result follows where a statement made without necessary warnings constitutes perjury. United States v. Di Giovanni, 397 F. 2d 409 (7th Cir. 1968); State v. Van Nostrand, 465 P. 2d 909 (Ore. App. 1970); Cf. People v. Genser, 58 Cal. Rptr. 290 (Cal. App. 1967); People v. Goldman, 234 N.E. 194 (N.Y. 1967). See also; Noland v. United States, 380 F. 2d 1016 (10th Cir. 1967) (Statements made by inductee at induction center); United States v. Kroll, 402 F. 2d 221 (3rd Cir. 1968) (same).

The reasoning of the above cases is supported by two recent decisions which hold that one can be prosecuted

for filing false information even though the statute which required the filing was unconstitutional. See Dennis v. United States, 384 U.S. 855 (1966); Bryson v. United States, 396 U.S. 64 (1969).

IX.

STATEMENTS CONSTITUTING THE RES GESTAE

Two states have adopted the theory that any statement admissible as part of the res gestae would be admissible without Miranda warnings. Hill v. State, 420 S.W. 2d 408 (Texas 1967) (question asked just after arrest); Fisk v. State, 432 S.W. 2d 912 (Texas 1968) (defendant in shock spoke despite attempts of officers to silence and warn); Spann v. State, 448 S.W. 2d 128 (Texas 1969); Brown v. State, 437 S.W. 2d 828 (Texas 1969); Moore v. State, 440 S.W. 2d 643 (Texas 1969); Wright v. State, 440 S.W. 2d 646 (Texas 1969) (private citizen); Lucas v. State, 452 S.W. 2d 468 (Texas 1970) (victim came upon suspect who had been stopped for traffic violation while in victim's car). Jones v. State, 458 S.W. 2d 654 (Texas 1970) (inquiring about pills found in glove compartment).

In People v. O'Neill, 162 N.W. 2d 490 (Mich. App. 1968) it was held that statements made in resistance to arrest are admissible as part of the res gestae without Miranda warnings. The same result was reached in People v. Bean, 151 N.W. 2d 878 (Mich. App. 1967) where a suspect was seen running on the street, stopped and asked why.

The res gestae theory seems superfluous. If the concept of res gestae is reasonably narrow in terms of remoteness of time and place it is safe to assume that

Miranda is not applicable. This is not because the statements are part of the res gastae, it is because the statements will be either non-custodial or volunteered or made to some private citizen.

X.

STATEMENTS TO UNDERCOVER AGENTS OR INFORMERS

If a suspect does not know he is speaking to a policeman he can hardly be said to have a reasonable belief that he is in custody. Nevertheless, it has been argued that undercover police should give warnings when the investigation focuses on the particular suspect. The argument clearly conflicts with Hoffa v. United States, 385 U.S. 293 (1966) and has been rejected by every court that has considered it. See Garcia v. United States, 364 F. 2d 306 (10th Cir. 1966); United States v. Baker, 373 F. 2d 28 (6th Cir. 1967); People v. Ward, 72 Cal. Rptr. 46 (Cal. App. 1968); People v. Patty, 59 Cal. Rptr. 881 (Cal. App. 1967); People v. Stenchever, 57 Cal. Rptr. 14 (Cal. App. 1967); Parnell v. State, 218 So. 2d 535 (Fla. App. 1969); People v. Palmer, 265 N.E. 2d 627 (Ill. 1970); State v. Maes, 469 P. 2d 529 (N.M. 1970) (cases cited therein); McCart v. State, 435 P. 2d 419 (Okla. Cir. 1968). See State v. Holmes, 476 P. 2d 878 (Ariz. App. 1970).

The ordinary situation involving an undercover agent is clearly non-custodial in all respects. However, there are cases dealing with a jailed suspect who makes a statement to his cellmate who conveys the information to the police. This has twice been approved. See Holston v. State, 208 So. 2d 98 (Fla. 1968); State v. Spence, 155

S.E. 2d 802 (N.C. 1967). There is an inherent Massiah problem involved in such situations. See Point XVIII (Massiah and Miranda).*

XI.

STATEMENTS AFTER TRAFFIC STOPS

Several courts have dealt with questioning of the driver of a vehicle stopped for traffic violations or for general investigation. Such questioning is thought to be non-custodial. This result is justified by several elements present in the traffic stop case: (a) the traffic stop is a common everyday occurence endured by most citizens one or more times and is not likely to create a belief that one is under arrest or in custody, (b) the questions are usually brief and non-accusatory, (c) the situation seems to fit within the rubric of "general on-the-scene" investigation, and (d) there is usually no definite "focus" on the person questioned with respect to a specific crime.

The cases holding traffic stop inquiries to be non-custodial are: Wilson v. Porter, 361 F. 2d 412 (9th Cir. 1966); Allen v. United States, 390 F. 2d 476 (D.C. Cir. 1968); Jennings v. United States, 391 F. 2d 512 (5th Cir. 1968); Lowe v. United States, 407 F. 2d 1391 (9th Cir. 1969); United States v. Chadwick, 415 F. 2d 167 (10th Cir. 1969); Bendelow v. United States, 418 F. 2d 42 (5th Cir. 1969); United States v. LeQuire, 424 F. 2d 341 (5th Cir. 1970); United States v. Tobin, 429 F. 2d 1261 (8th Cir. 1970) (routine license check); United States v. Chase, 414 F. 2d 780 (9th Cir. 1969); United States v. Edwards, 421 F. 2d 1346 (9th Cir. 1970); United States v. Robert-

*The reference is to Point XVIII of the original monograph.

son, 425 F. 2d 1386 (5th Cir. 1970); Campbell v. Superior Ct., 479 P. 2d 685 (Ariz. 1971) (for as long as is necessary to complete the citation); State v. Perez, 442 P. 2d 125 (Ariz. App. 1968); People v. Nieto, 55 Cal. Rptr. 546 (Cal. App. 1967); People v. Gant, 70 Cal. Rptr. 801 (Cal. App. 1968); People v. Tate, 259 N.E. 2d 791 (Ill. 1970); People v. Ricketson, 264 N.E. 2d 220 (Ill. App. 1970); Montgomery v. United States, 268 A. 2d 271 (D.C. App. 1970) (conversation while officer wrote ticket); Schnepp v. State, 437 P. 2d 84 (Nev. 1968); State v. Twitty, 246 N.E. 2d 556 (Ohio App. 1969); Fritts v. State, 443 P. 2d 122 (Okla. 1968); State v. Lister, 469 P. 2d 597 (Wash. App. 1970); State v. Gray, 473 P. 2d 189 (Wash. App. 1970). See People v. Bolinski, 67 Cal. Rptr. 347 (Cal. App. 1968).

The two cases to the contrary rely upon the theory that a suspect must be considered in custody as soon as the officer has probable cause to arrest. People v. McFall, 66 Cal. Rptr. 277 (Cal. App. 1968); People v. Ceccone, 67 Cal. Rptr. 499 (Cal. App. 1968).

XII.

STATEMENTS DURING THE COURSE OF STOP AND FRISK

a. General Stop and Frisk One pressing question arising under Miranda is whether a stop and frisk situation constitutes custody for purposes of Miranda. In most jurisdictions having stop and frisk procedures the officer is usually authorized to ask a few simple questions, i.e., name, address, and explanation of actions. The right to ask the questions was neither approved nor disapproved in Terry v. Ohio, 392 U.S. 1 (1969), but the concurring

opinions of Justices White and Harlan seem to favor the idea. In any event, under state stop and frisk laws the power usually exists. See People v. Rosemond, 257 N.E. 2d 23 (N.Y. 1970); People v. Gerule, 471 P. 2d 413 (Colo. 1970); Loyd v. Douglas, 313 F. Supp. 1364 (S.D. Iowa 1970) (allowed to leave on refusal to answer).

In People v. Manis, 74 Cal. Rptr. 423 (Cal. App. 1969), an opinion well worth reading, the Court held that a short period of on the street questioning in connection with a stop and frisk does not require Miranda warnings. The Court reasoned first that formal custody does not exist in stop and frisk. Second, the Court noted that the language of the Miranda opinion had undergone a meaningful change from its preliminary print into its final form. In the Preliminary Print of the U.S. Reports the Miranda opinion referred to one in "custody or otherwise deprived of his freedom of action in any way". In the Official Report the phrase was changed to "custody or otherwise deprived of his freedom of action in any *significant* way" (emphasis added). The California Court reasoned that a stop and frisk though it was a deprivation of freedom of action was not a significant deprivation and thus Miranda was inapplicable.

The Manis case was followed in People v. Glover, 75 Cal. Rptr. 629 (Cal. App. 1969) and other California cases accept the general proposition espoused in Manis. See People v. Mc Lean, 85 Cal. Rptr. 683 (Cal. App. 1970); People v. Singleton, 63 Cal. Rptr. 324 (Cal. App. 1967); People v. Weger, 59 Cal. Rptr. 661 (Cal. App. 1967); People v. Hubbard, 88 Cal. Rptr. 411 (Cal. App. 1970); People v. Herrara, 90 Cal. Rptr. 802 (Cal. App. 1970) (temporary detention while car searched for aliens, single question asked about packages in the car).

At least two federal cases seem to support the general principle that questions asked during stop and frisk do not require warnings. See United States v. Thomas, 396 F. 2d 310 (2nd Cir. 1968); Lowe v. United States, 407 F. 2d 1491 (9th Cir. 1969). The District of Columbia has held that stop and frisk does not constitute custody for Miranda purposes. Green v. United States, 234 A. 2d 177 (D.C. 1967). See White v. United States, 222 A. 2d 843 (D.C. 1966); Keith v. United States, 232 A. 2d 92 (D.C. 1967). The same result is reached in Utsler v. State, 171 N.W. 2d 739 (S.D. 1969) and People v. Armstrong, 298 N.Y.S. 2d 630 (N.Y. App. 1969); State v. Lister, 469 P. 2d 597 (Wash. App. 1970); Cf. State v. Miranda, 450 P. 2d 364 (Ariz. 1969); United States v. Marlow, 423 F. 2d 1064 (5th Cir. 1970).

Several opinions seem to adopt the principle that stop and frisk questioning is non-custodial by allowing the police to "accost" a person for a few inquiries. See Morgan v. State, 234 A. 2d 762 (Md. App. 1967); Priestly v. State, 446 P. 2d 405 (Wyo. 1968). See State v. Farmer, 476 P. 2d 129 (Wash. App. 1970) (stopping of persons who resemble a suspect).

It must be emphasized that the courts sustaining stop and frisk inquiries rely heavily on the brevity and neutrality of the questions. This suggests that what underlies the opinions is not only the belief that the situation is not "custodial", but also the belief that what takes places does not constitute "interrogation" as the Court in Miranda used the word.

Finally, if a person is a proper subject of stop and frisk and nothing more—the right to stop and frisk may not include the right to take the person to the police station for extensive interrogation. The question is un-

decided. See Morales v. New York, 396 U.S. 102 (1969). It may well be that probable cause to arrest will be required in such a case. See Doran v. United States, 421 F. 2d 865 (9th Cir. 1970).

b. Questions Asked in the Interest of Self-Protection

Relying on the self-protection rationale of the stop and frisk cases the courts have extended admissibility to statements made immediately after arrest when those statements were made in answer to questions about where a known weapon was kept. The Courts reason that there is no "custodial interrogation" but it is probably more accurate to say what occurs is "custodial non-interrogation".

In People v. Ramos, 170 N.W. 2d 189 (Mich. App. 1969) the suspect's wife told the officers he had a gun. They apprehended the suspect and asked him where the gun was. He denied having it and was told to quit kidding and tell where it was. He pointed to his belt. The Court relied on the right of the officers to protect themselves as justifying the asking of the questions. Similarly, a Court has upheld the actions of an officer who interrupted his fellow officer—while he was giving the warnings—to ask where the gun was. State v. Lane, 467 P. 2d 304 (Wash. 1970). See also Weissinger v. State, 218 So. 2d 432 (Miss. 1969); Ballew v. State, 441 S.W. 2d 453 (Ark. 1969).

In one case where the officer was held justified in asking about a gun in order to protect himself, the Court advanced the theory that such a question was permissible as "general on the scene questioning," Pope v. State, 478 P. 2d 801 (Alaska 1970).